

Channel 295A to Los Banos, California, as that community's second local FM broadcast service.

DATES: Comments must be filed on or before June 9, 1988, and reply comments on or before June 24, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's counsel, as follows: Michael H. Bader, Esq., Haley, Bader & Potts, 2000 M St. NW., Suite 600, Washington, DC 20036.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-147, adopted March 10 and released April 20. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.
Steve Kaminer,
Deputy Chief, Policy and Rules Division,
Mass Media Bureau.

[FR Doc. 88-9358 Filed 4-27-88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-153, RM-6273]

Radio Broadcasting Services; Cartago and McFarland, CA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document requests comments on a petition for rule making filed on behalf of Caballero Spanish Media, Inc., proposing the substitution of FM Channel 275B1 for Channel 275A at McFarland, California, and modification of the permit for Station KXFM(FM) (Channel 275A), accordingly, to provide that community with its first wide coverage area FM service. Additionally, petitioner requests the substitution of Channel 273A for Channel 275A at Cartago, California, to accommodate its proposal.

DATES: Comments must be filed on or before June 10, 1988, and reply comments on or before June 27, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner's consultant, as follows: Don Werlinger, The Broadcast Development Group, Inc., P.O. Box 1223, Lockhart, TX 78644.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-153, adopted March 18, 1988, and released April 19, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division,
Mass Media Bureau.

[FR Doc. 88-9356 Filed 4-27-88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-154, RM-6200]

Radio Broadcasting Services; Grifton, NC

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: The Commission requests comments on a petition by MC Radio Partnership proposing the substitution of Channel 258C2 for Channel 257A at Grifton, North Carolina, and the modification of its permit to specify the higher powered channel. Channel 258C2 can be allocated to Grifton in compliance with the Commission's minimum distance separation requirements with a site restriction of 26.0 kilometers (16.2 miles) southeast to avoid a shortspacing to Station WMAG, Channel 258C, High Point, North Carolina, and to Channel 258A at Emporia, Virginia, which is unoccupied and unapplied for. In accordance with § 1.420(g) of the Commission's Rules, competing expressions of interest in use of Channel 258C2 at Grifton will not be accepted.

DATES: Comments must be filed on or before June 10, 1988, and reply comments on or before June 27, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioner, or its counsel or consultant, as follows: David Oxenford, Esq., Fisher, Wayland, Cooper & Leader, 1255 23rd Street NW., Suite 800, Washington, DC 20037 (Counsel to petitioner).

FOR FURTHER INFORMATION CONTACT: Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-154, adopted March 18, 1988, and released April 19, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, International

Transcription Service, (202) 857-3800, 2100 M Street NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, see 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer,

Deputy Chief, Policy and Rules Division,
Mass Media Bureau.

[FR Doc. 88-9357 Filed 4-27-88; 8:45 am]

BILLING CODE 6712-01-M

47 CFR Part 73

[MM Docket No. 88-148, RM-6033; RM-6101]

Radio Broadcasting Services; Ariton, AL and Bonifay, FL

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: This document seeks comments on two mutually-exclusive petitions for rule making in the states of Alabama and Florida. The first, filed on behalf of Patsy Nance Marsh and Rickey Earl Nance, seeks the allotment of Channel 249A to Ariton, Alabama, as that community's first local service. The second petition, filed on behalf of Mary Lake Communications, Inc., licensee of Station WTBB(FM) (Channel 249A), Bonifay, Florida, seeks the substitution of Channel 249C1 for Channel 249A and modification of its license accordingly. The Ariton proponent is required to provide additional information in an effort to establish that such place is a *bona fide* "community" for allotment purposes.

DATES: Comments must be filed on or before June 10, 1988, and reply comments on or before June 27, 1988.

ADDRESS: Federal Communications Commission, Washington, DC 20554. In addition to filing comments with the FCC, interested parties should serve the petitioners' consultants, as follows:

Ariton, AL: Paul Reynolds, Amerimedia, 415 N. College St., Greenville, AL 36037; Bonifay, FL: C.F. Ellis, 1103 La Nouvelle Rd., Lafayette, LA 70508.

FOR FURTHER INFORMATION CONTACT: Nancy Joyner, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission's Notice of Proposed Rule Making, MM Docket No. 88-148 adopted March 4, 1988, and released April 19, 1988. The full text of this Commission decision is available for inspection and copying during normal business hours in the FCC Dockets Branch (Room 230), 1919 M Street, NW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractors, International Transcription Service, (202) 857-3800, 2100 M Street, NW., Suite 140, Washington, DC 20037.

Provisions of the Regulatory Flexibility Act of 1980 do not apply to this proceeding.

Members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. See 47 CFR 1.1231 for rules governing permissible *ex parte* contact.

For information regarding proper filing procedures for comments, See 47 CFR 1.415 and 1.420.

List of Subjects in 47 CFR Part 73

Radio broadcasting.

Federal Communications Commission.

Steve Kaminer

Deputy Chief, Policy and Rules Division,
Mass Media Bureau.

[FR Doc. 88-9361 Filed 4-27-88; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 531

[Docket FE-87-02; Notice 1]

Passenger Automobile Average Fuel Economy Standards; Denial of Petitions for Rulemaking

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Denial of petitions for rulemaking.

SUMMARY: This notice denies petitions for rulemaking submitted by Mercedes-Benz of North America and the General Motors Corporation. Mercedes asked the agency to retroactively reduce the model year 1984 and 1985 corporate average fuel economy (CAFE) standards for passenger automobiles to 26.0 miles per gallon or below. General Motors asked the agency to retroactively reduce the model year 1985 standard to 26.0 miles per gallon or below. The model year 1984 standard was set by the agency; the model year 1985 standard, by Congress in the CAFE statute. The agency is denying both petitions for the reasons set forth in this notice.

FOR FURTHER INFORMATION CONTACT: Barry Felrice, Associate Administrator for Rulemaking, National Highway Traffic Safety Administration, Room 5401, 400 Seventh Street SW., Washington, DC 20590, (202) 366-1810.

SUPPLEMENTARY INFORMATION:

Background

Title V of the Motor Vehicle Information and Cost Savings Act (Cost Savings Act), which is codified at 15 U.S.C. 2001-2012, provides for an automotive fuel economy regulatory program under which standards are established for the corporate average fuel economy (CAFE) of the annual production fleets of passenger automobiles and of light trucks. Title V was added in 1975 to the Cost Savings Act by the Energy Policy and Conservation Act (EPCA). Responsibility for the automotive fuel economy program was delegated by the Secretary of Transportation to the Administrator of NHTSA.

Title V provides that NHTSA has full discretion to decide to amend the standards. If NHTSA decides to issue an amendment, however, the agency is required to comply with the Administrative Procedure Act (APA) (5 U.S.C. 501 *et seq.*) and to set the amended standards at the "maximum feasible" level of average fuel economy. Section 502(e) of the Cost Savings Act requires NHTSA to consider four factors in determining maximum feasible average fuel economy: Technological feasibility; economic practicability; the effect of other Federal motor vehicle standards on fuel economy; and the need of the nation to conserve energy. Section 502(c) expressly provides for establishing standards for separate classes of passenger automobiles produced by low volume manufacturers and exempted under that subsection from the generally applicable standards established under subsection (a).

Section 502(b) similarly provides for establishing standards for separate classes of light trucks. However, section 502 does not make any provision for creating separate classes of unexempted passenger automobiles and for establishing standards for them.

Section 502 specified CAFE standards for passenger automobiles of 18, 19 and 20 mpg for model years 1978, 1979, and 1980, respectively, and 27.5 mpg for model year 1985 and thereafter. The Secretary of Transportation was required to establish standards for model years 1981-84 by July 1, 1977. Section 502(a)(3) requires that the standards for each of those model years be set at a level which (1) is the maximum feasible average fuel economy level and (2) would result in steady progress toward meeting the standard for model year 1985. On June 30, 1977, NHTSA adopted CAFE standards for passenger automobiles for model years 1981-84 (42 FR 33534). These standards were 22 mpg for 1981, 24 mpg for 1982, 26 mpg for 1983, and 27 mpg for 1984.

Section 502(f)(1) provides that the model year 1981-84 standards may be amended, from time to time, as long as the amended standards are set at the maximum feasible level and at a level representing steady progress toward the model year 1985 standard. In 1979, General Motors and Ford did informally request that rulemaking be initiated to reduce the model year 1981-84 standards. NHTSA denied the request on the ground that there was no showing that the standards were infeasible, but invited petitions in the future if there were any inaccuracies in the agency's analysis of the requests or any new facts significant enough to warrant commencing rulemaking. (See "Report on Requests by General Motors and Ford to Reduce Fuel Economy Standards for MY 1981-84 Passenger Automobiles" June 1979, and the accompanying notice of availability, June 25, 1979; 44 FR 37104) General Motors and Ford did suggest in August 1986 in their comments on a supplemental NPRM on the reduction of the model year 1987-88 standards for passenger automobiles that the agency retroactively reduce the model year 1984-85 standards if it did not reduce the model year 1987-88 standards to 26.0 mpg. As noted above, the standards for model year 1987-88 were reduced to 26.0 mpg. No petition for rulemaking to reduce the model year 1984-85 standards was submitted until August 1987.

Section 502(a)(4) authorizes (but does not require) the agency to amend the standard of 27.5 mpg for model year 1985 or any subsequent model year if it

finds that the maximum feasible fuel economy level is higher or lower than 27.5 mpg in that year and sets the standard at that level. The agency has not previously amended the statutory standard of 27.5 for model year 1985, and did affirm the feasibility of that standard on several occasions. (For example, see the preamble to the June 1977 final rule adopting the model year 1981-1984 standards, and the June 1979 report on requests by General Motors and Ford to reduce the model year 1981-84 standards.) In response to timely petitions, the agency did reduce the passenger automobile standards for model years 1986-88 from 27.5 mpg to 26.0 mpg (50 FR 40528, October 4, 1985, for model year 1986 and 51 FR 35594, October 6, 1986, for model years 1987-88). Also, in response to a timely petition, the agency did reduce the 1985 light truck CAFE standard. (October 22, 1984; 49 FR 41250) (But see, discussion later regarding the agency's conclusion that a petition to amend the 1984 light truck standards was untimely.)

Title V provides for civil penalties for violating a CAFE standard and credits for exceeding one, in the amount of \$5 for each 0.1 mpg that a manufacturer's fleet is below (above, in the case of credits) the standard, multiplied by the number of automobiles in that fleet. The credits may be used to offset a shortfall that occurs when a manufacturer does not achieve in a model year the CAFE required by the standard for that year. Manufacturers may carry credits as far back as three model years before the year in which they are earned or as far forward as three model years after the year in which they are earned. (See sections 502(l), 507 and 508 of the Cost Savings Act.)

If information available to the agency indicates that a manufacturer's CAFE for a model year fell below the standard for that year, and the manufacturer does not have sufficient carry-forward credits to offset the shortfall, the agency is required by section 502(l)(1)(C)(iv) to notify the manufacturer of that fact and provide a reasonable period for the manufacturer to submit a plan for earning sufficient credits in the three following model years to offset that shortfall completely. If a carry-back plan is not submitted and approved, the agency is required by section 508 to commence a proceeding under that section to determine whether the manufacturer has violated section 507(a)(1), which makes it unlawful to fail to comply with a CAFE standard for passenger automobiles. If the agency makes that determination, on the record following opportunity for agency

hearing, the agency assesses civil penalties according to the formula described above.

Finally, under section 508, penalties may be compromised, modified or remitted in only three circumstances: If necessary to prevent insolvency or bankruptcy of a manufacturer; if a manufacturer shows that the violation was the result of an act of God, strike, or fire; or if the Federal Trade Commission certifies (in response to a request by a manufacturer for relief) that a modification of the penalty is necessary to prevent a substantial lessening of competition.

The Petitions

Petitions for rulemaking to reduce the model year 1984-85 standards were submitted after the agency notified several manufacturers of apparent noncompliance with one or both of those standards.

Mercedes-Benz

On July 11, 1986, NHTSA notified Mercedes that it had not achieved the level of the model year 1984 standard, and that the agency planned to apply credits earned in model year 1981 toward Mercedes' shortfall. Mercedes was given 30 days in which to comment on this proposed action, and did not submit any comment. Since Mercedes had sufficient credits, it was in compliance and did not pay a civil penalty for 1984.

For model year 1985, Mercedes was furnished notice by NHTSA on May 4, 1987, that it did not achieve the level of the applicable standard, and that there appeared to be insufficient carry-forward credits available to offset the entire shortfall. Mercedes was provided an opportunity to file a carry-back plan demonstrating that it would earn sufficient credits over the following three years to offset the shortfall. Mercedes did not file a carry-back plan. Instead, it sent the agency a letter, dated July 6, 1987, challenging the basis for the preliminary finding of noncompliance.

In August 1987, Mercedes filed with the agency a petition for rulemaking requesting that the agency reduce both the standard of 27.0 mpg for model year 1984 and the standard of 27.5 mpg for model year 1985 to 26.0 mpg or lower. Mercedes indicated two bases for granting its petition.

First, Mercedes argued that, due to events after their establishment, the standards for model years 1984 and 1985 exceed the "maximum feasible average fuel economy level." Mercedes concluded that they are thus "incompatible with the EPCA and must

be lowered to the actual maximum feasible level." The petitioner argued that, even under the agency's own current interpretation of "maximum feasible," the standards in those years were too high, because two of the major domestic car manufacturers with substantial market shares, GM and Ford, did not meet those standards. Because NHTSA's rulemaking notices regarding the reduction of the model year 1986 standard stated that these manufacturers had used reasonable efforts to reach that standard, Mercedes contended that their failure to reach the 1984-5 standards must mean that those standards also were too high.

Second, petitioner argued that the agency's current interpretation of "maximum feasible" is invalid. Mercedes stated that the agency's interpretation of "maximum feasible" focuses on the capabilities of GM and Ford to define what is feasible for the industry at large, and disregards the capabilities and limitations of the rest of the industry. The agency's approach, according to Mercedes, excludes significant segments of the automobile market, and is discriminatory. Mercedes argued that NHTSA should take into account the collective capability of manufacturers within each significant market segment. The petitioner suggested that European manufacturers, and limited line manufacturers, should each be treated as a separate class.

General Motors

General Motors was advised of its model year 1985 shortfall by NHTSA in a letter dated May 4, 1987. A plan for earning offsetting credits in subsequent model years was submitted by General Motors on June 26, 1987, and approved by the NHTSA Administrator on October 13, 1987.

General Motors filed its petition on November 10, 1987, seeking amendment of the model year 1985 standard to 26.0 mpg or lower. General Motors provided a somewhat different rationale for its argument, and specifically did not join Mercedes in seeking amendment of the 1984 standard. General Motors' primary argument focused on the analysis conducted by NHTSA in support of its decision to reduce the model year 1986 standard, in which NHTSA concluded that General Motors and Ford had sufficient plans to meet a standard of 27.5 mpg for model year 1986, that they had made significant progress in implementing those plans, but that they were prevented by unforeseen events from fully implementing the plans. General Motors argued that the same analysis applies to model year 1985, and stated that "the only difference between

the two years is that manufacturers had even less time to overcome the unforeseeable by MY 1985."

Agency Response To Petitions

NHTSA has decided to deny both petitions. The agency does not disagree that its analysis of the reasonable efforts made by the manufacturers to meet the 1986 standard has relevance to the industry's capabilities for model year 1985. General Motors is essentially correct in observing that the only difference between the two years is that the industry had even less time to achieve the 1985 standard. NHTSA continues to believe that the industry as a whole had sufficient plans to meet the 27.5 mpg standard for model year 1986 and made significant progress toward doing so, but was prevented from fully implementing the plans by unforeseen events, particularly the unanticipated fall in gasoline prices, and attendant consumer demand for larger engines and larger cars.

Notwithstanding the agency's acknowledgement that, in retrospect, events in the early/mid 1980's created compliance difficulties and may even have caused the model year 1985 standard to exceed the industry's capabilities for that year, the agency does not believe that this observation is sufficient to justify a retroactive amendment, particularly in the absence of a timely petition for rulemaking from the regulated industry. The agency bases its decision primarily on a determination that such a retroactive amendment would be inconsistent with the statutory scheme. As to the Mercedes arguments about the agency's interpretation of the statutory term "maximum feasible," the agency reaffirms its interpretation.

I. The Authority To Amend is Discretionary, But Cannot Be Exercised in Such a Way as To Disturb the Statutory Scheme

The agency has stated on several occasions that it interprets section 502 as providing the agency full discretion to decide whether an amendment of an average fuel economy standard is warranted. Thus, the agency disagrees with the petitioners' view that the agency has any duty to amend the CAFE standards. Since Title V provides no explicit guidance to the agency for exercising its discretion, the agency is limited only by the APA, which directs that agencies not act arbitrarily or capriciously. (While not providing guidance on the question of whether to amend, the statute does expressly provide that an amendment, if made, must be set at the maximum feasible

level. This point is discussed more fully below.)

In the absence of explicit guidance in Title V on the exercise of its discretion, NHTSA has looked to the statutory scheme as a whole and the APA to determine whether it should or could amend a CAFE standard for a bygone year. The agency has concluded that such retroactive amendment is inconsistent with several aspects of the statutory scheme. First, the agency believes that the statutory scheme of establishing annual standards, but permitting the attainment of compliance through the earning and applying of credits to handle shortfalls, is not consistent with retroactive amendment of a standard after the end of the applicable model year. Congress included a one year carry-back/carry-forward provision in Title V in 1975 to provide the manufacturers some flexibility in dealing with the problems created by falling short of a standard. When Congress amended Title V in 1980 to extend the availability of credits from one year to three, and provided for the submission of carry-back plans for the use of credits in advance of their actually being earned, the legislative history made it clear that Congress believed it was increasing the manufacturers flexibility regarding the problems associated with shortfalls. The Senate Report stated that the extension "to provide greater flexibility in the application of existing rules covering carry-forward/carry-back of civil penalties (sic; should have read "credits") will relieve some of the burden of present regulation on automobile manufacturers." Sen. Rpt. No 96-642, March 25, 1980, page 4. With respect to the requirement for submittal of a plan, the Report stated that:

submittal of such a plan offers useful deterrent to a scenario (improbable though it may be) in which a manufacturer might fail over a successive period of as many as 3 years to meet each year's CAFE standard and then appeal for economic relief from a massive civil penalty accrued over that period. *Ibid.*, page 7.

The flexibility of carry-forward and carry-back credits would not have been needed if the agency could (or must, as the petitions imply) retroactively amend standards to account for industrywide shortfalls. The fact that Congress did extend the availability of credits suggests that retroactive amendment was not thought to be an available option. It further suggests that Congress recognized that there would be some years in which shortfalls might occur for a variety of reasons. Instead of directing the agency to remedy such shortfalls

through retroactive rulemaking, Congress chose to expand the availability of credits to offset these potential shortfalls.

Other aspects of the statutory scheme that would be disturbed by retroactive amendments are the precise and narrow provisions for commencing a proceeding to determine the existence of a noncompliance and to assess civil penalties and for mitigation of civil penalties in the event that a shortfall cannot be offset by credits. Congress chose to restrict this authority of the Secretary of Transportation quite specifically. With respect to mitigation of penalties, Congress provided for mitigation in three specific instances only, specifying express limitations on the exercise of discretion in two of the instances and requiring consultation with the Federal Trade Commission in the other instance. If retroactive rulemaking amounted to an indirect attempt by the agency to remit penalties, it would be contrary to the statutory scheme.

Finally, the statutory scheme for making refunds to manufacturers for civil penalties already paid would also be disturbed by retroactive amendment. Sections 507 and 508 together provide that a manufacturer which has violated a standard (i.e., has fallen short of a standard and has not obtained agency approval of a plan projecting its earning of sufficient credits in the three following years to completely offset its shortfall) must pay the civil penalty for the shortfall, and later apply for a partial refund in the amount of any credits actually earned during those subsequent three years. The provision in section 508 regarding the refund of civil penalties is the only provision in Title V dealing with that subject. Yet, the retroactive amendment sought by these two petitioners would cause refunds to be made in excess of \$3 million to two manufacturers that paid civil penalties for one or both of model years 1984-85. These refunds would be made, not because those manufacturers earned credits in subsequent years, as the statute contemplates, but because the standards would have been retroactively amended.

Further, reducing a standard for a model year after the year is over would raise questions about equity of such an amendment for manufacturers which absorbed the costs of compliance with the standard for a particular model year. While not directly disturbing the statutory scheme in the same manner as the examples above, these perceived inequities must be considered by the agency in the context of whether the

manufacturers that did comply (with or without credits) might decline to make efforts in the future, counting instead on retroactive amendment. If this were to occur, the statutory scheme would indeed be disturbed.

In its October 1984 decision amending the model year 1985 light truck CAFE standards (49 FR 41250, October 22, 1984), NHTSA concluded that "petitions to amend fuel economy standards must be submitted in time to permit necessary rulemaking to be completed prior to the start of the model year," 49 FR at 41255. The agency relied on both the Administrative Procedure Act (APA) and the statutory scheme of Title V, to support its view that courts would be unlikely to imply authority to issue retroactive rules in the context of Title V. *Ibid.*

General Motors now argues that retroactive rulemaking may be permissible under the APA in some circumstances. The agency agrees, and notes that this issue is unsettled and presently under consideration by the Supreme Court of the United States. *Bowen v. Georgetown University Hospital*, U.S. S.Ct., No. 87-1079, petition for certiorari granted February 29, 1988. However, the fact that retroactive rulemaking may sometimes be permissible under the APA does not mean that an agency must adopt rules whose effect is largely, if not entirely, retroactive. Under the APA, an agency decision to apply a rule retroactively will be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(2)(A).

General Motors also has argued that an amendment to the model year 1985 standard has "future" (as well as retroactive) effect because it could influence the behavior of regulated parties in model year 1988 (the last year in which "carry-back" credits may be earned to offset MY 1985 shortfalls.) The agency is not persuaded that an amendment to a standard for a bygone model year could be seen as *regulating* the future conduct of those parties. The standard for any given year regulates each manufacturer by requiring it to produce a fleet of passenger automobiles in that year which meets the standard. The manufacturer's opportunity to use credits from other years to offset noncompliance of the given year's fleet with the standard for that year does not alter the fact that the given year is the period of time regulated by that standard. An amendment now of the model year 1985 standard would not and could not regulate the conduct of any

manufacturer during that year since the production period for that year is long over. There is no more opportunity for the regulated parties to revise their model mixes or otherwise change their behavior in that model year.

Even if the time period during which credits could be earned were of any theoretical significance in assessing the prospective effect of making retroactive amendments to standards for prior model years, it is not significant in this case. Because these petitions were filed so late, the agency could not issue a final rule soon enough even to affect, much less regulate, any future conduct of the manufacturers. The time period during which carry-back credits could have been earned for application to model year 1984 was virtually over when Mercedes filed its petition. As for the time period in which to earn carry-back credits for application to model year 1985, that period would be virtually over by the summer of 1988, which is when any final rule amending that standard would have been issued.

The agency also believes that the retroactive reduction of standards is inconsistent with the legislative history of Title V. Both petitioners argued that the statute is entirely consistent with the concept of retroactive amendment, citing particularly the absence of express statutory prohibitions or deadlines for such amendments, as compared with the express, straightforward provisions governing the timing of amendments to increase the standards. Petitioners also suggested, erroneously, that the agency addressed the issue of retroactive amendments as early as its issuance of the model year 1981-84 standards in 1977 and that it interpreted Title V as permitting such amendments.

The issue of retroactive amendments and the interpretation of legislative language and history in the context of that issue were not discussed or even considered by the agency in issuing the model year 1981-84 standards or in addressing, during the next six years, the issue of the agency's authority to reduce those standards. Further, the agency finds nothing in the record to support the petitioners' expansively reading that 1977 agency statement or any other agency statement prior to 1984 as an agency endorsement of reducing a standard after the beginning of the model year to which it applies. Although the agency's 1977 final rule on the model year 1981-84 standards stated that amendments reducing a standard for a model year could be issued "at any time," there is nothing in the preamble to suggest that the agency had in mind

retroactive rulemaking in making that statement. A more reasonable reading of that statement is that it merely took note of the substantial number of years between 1977 and the 1981-84 period, which would permit extensive opportunities to consider issuing an amendment reducing one of these standards, since such amendments could be made at any time prior to the model year in question. NHTSA noted its flexibility in issuing amendments to reduce a standard in contrast to the requirement in section 502(f)(2) that amendments raising standards be issued 18 months in advance of the model year in question. The statement also served to contrast the flexible amendment authority with the requirement in section 502(a)(3) rigidly scheduling the promulgation of the model year 1981-84 standards in the first place. Finally, NHTSA also sought to contrast the substantial interval between 1977 and model years 1981-1984 with the much shorter interval available to the Environmental Protection Agency in considering whether to suspend the model year 1975 emission standards, as discussed in *International Harvester Company v. Ruckelshaus*, 478 F.2d 615 (D.C.Cir. 1973).

The issue of retroactively amending a generally applicable standard first arose before the agency in the context of its consideration of Ford's petition to lower the model year 1984-85 light truck standards. That petition was filed on November 21, 1983. The interpretation which the agency subsequently issued was one of first impression. The agency's conclusion that retroactive amendments were inconsistent with the legislative history of Title V was first set out in its proposal to deny, as untimely, Ford's petition to reduce the model year 1984 light truck standard, but to grant its petition to reduce the model year 1985 light truck standard. That proposal was published May 30, 1984 (49 FR 22516), well in advance of the beginning of model year 1985. The reasoning underlying the interpretation was discussed in the May proposal and was more fully laid out in a publicly-available August 23, 1984, letter from the agency to Ms. Winkler-Doman of Ford, and was reiterated in the agency's October 22, 1984 (49 FR 41250) final rule reducing the model year 1985 light truck standard. That notice set forth the agency's interpretation for the benefit of anyone contemplating petitioning in the future for retroactive amendment of any of the fuel economy standards. The notice also responded to Ford's request for the agency to specify a precise date by which petitions to reduce a standard

must be submitted to the agency. The agency did not establish a mandatory submission date, but did suggest that proper agency consideration of a petition to reduce a standard for a given model year would be facilitated if petitions were submitted early in the calendar year in which that model year begins.

The agency here reaffirms its 1984 interpretation regarding retroactive amendments. The D.C. Circuit cited this interpretation in *In Re: Center for Auto Safety*, 793 F.2d 1346, 1348 (1986). NHTSA believes that the petitioners have not stated any compelling reason for changing that original interpretation and that there is insufficient reason to justify a departure from the agency's prior interpretation, as required by courts. See *Motor Vehicle Manufacturers Association v. State Farm*, 463 U.S. 29, 41-42, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983).

In its 1984 interpretation, the agency noted that while the statute does not contain explicit language concerning an amendment which lowers a CAFE standard, it does contain language that suggests that reductions are to be made prospectively, i.e., before the beginning of the model year in question. The agency cited arguments by Chrysler that amendments reducing the stringency of standards must be made at least 18 months before the beginning of the model year and that, therefore, Ford's petition regarding model year 1984-5 light truck standards was too late with respect to both models years. Chrysler argued that section 502(b) calls for 18 months leadtime for any light truck standards being prescribed and that changes in standards come within that requirement. Chrysler argued also that the 18 month requirement of section 502(f)(2) was applicable since granting Ford's request would in effect make the standards more stringent for Chrysler. Section 502(f)(2) applies to amendments to passenger automobile standards as well as those to light truck standards.

On the other hand, there are other statutory provisions that some past commenters have interpreted to the opposite effect. Section 502(f)(1) provides that amendments to the 1981-84 car standards may be made "from time to time." Some manufacturers have interpreted that language to indicate that there is no temporal limitation on amendments reducing standards. They have also noted the absence of any express limitation in the statute on the time period in which an amendment reducing a standard may be adopted.

To aid in resolving this issue, the agency carefully examined the

legislative history of section 502. The relevant legislative history of section 502 is found in the Conference Report on EPCA which contains the following discussion:

Average fuel economy standards prescribed by the ST (Secretary of Transportation) for passenger automobiles in model years after 1980, for non-passenger automobiles, and for passenger automobiles manufactured by manufacturers of fewer than 10,000 passenger automobiles may be amended from time to time as long as each such amendment satisfies the 18 month rule—i.e., any amendment which has the effect of making an average fuel economy standard more stringent must be promulgated at least 18 months prior to the beginning of the model year to which such amendment will apply. An amendment which has the effect of making an average fuel economy standard less stringent can be promulgated at any time prior to the beginning of the model year in question. See Sen. Rep. 94-516, 94th Cong., 1st Sess. (1975) at 157. (Emphasis added.)

The agency reaffirms its belief that the language in the legislative history is clear. Amendments increasing standards may be made at any time up to 18 months before the model year, while amendments reducing a standard may be made at any time up to the beginning of the model year. If no limit on the timing of amendments reducing the standards had been intended, the second-quoted sentence would have ended with the words "promulgated at any time."

As to the petitioners arguments about the absence of any express deadline in Title V for amendments reducing a standard, the agency notes that deadlines are generally specified in Title V, as in the agency's other vehicle regulatory statutes, to ensure that the agency completes its rulemaking establishing new requirements far enough in advance of the effective date to provide adequate leadtime for regulated parties to achieve compliance. Although Title V does not contain an express requirement that an amendment reducing a standard be issued before the beginning of the model year to which it applies, the agency does not interpret the fact of that absence to indicate that Congress permits retroactive amendment of the standards. In light of the legislative history, it is likely that Congress viewed a provision expressly specifying such a deadline as unnecessary.

General Motors made a related argument that the conference committee's choice of the House's 18-month deadline for amendments increasing standards over the Senate's 18 month deadline for all amendments to standards indicates that Congress

desired that there be no deadline for amendments reducing standards. The legislative history of Title V provides no indication that Congress wanted to authorize retroactive rulemaking. The agency believes that the choice of the House version indicates only that Congress recognized that no leadtime was necessary to enable manufacturers to conform their conduct to a relaxing amendment and sought to allow the issuance of such amendments right up to the beginning of the model year. Cutting these amendments off 18 months before the beginning of the model year would have been inconsistent with the provision in the APA allowing a rule relieving a restriction to become effective immediately upon issuance.

General Motors stated that the agency has, on several occasions, amended a CAFE standard after the beginning of the model year to which it applies and suggested that those actions indicate that the agency does not, in fact, regard the beginning of the model year as a deadline for issuing an amendment that relaxes a standard. General Motors argued further that even if the beginning of the model year is a deadline contemplated by Congress, the expiration of the deadline does not deprive the agency of its rulemaking authority. The rulemaking actions underlying General Motors' arguments were NHTSA's amendment of the 1982 and 1985 model year standards for light trucks after the beginning of the respective model years and the agency's issuance of exemptions from the generally applicable standards for passenger automobiles after the beginning of the model years to which they applied. As further support for its argument about the alleged insignificance of the expiration of a rulemaking deadline, General Motors noted the agency's issuance of several light truck standards after the statutory deadline of 18 months before the beginning of the model year.

The 1982 amendment to the model year 1982 light truck standard is distinguishable from the amendments sought by the petitioners in that the amendment did not reduce that standard. The amendment, which added an alternative compliance option for model year 1982 light trucks, did not reduce the level of average fuel economy that a manufacturer would be required to achieve. The stringency of the standard therefore remained unchanged. (February 18, 1982; 47 FR 7245, 7247.)

At the time of its issuance, the agency believed that the October 16, 1984 amendment to the model year 1985 light

truck standard was timely. This belief was based on the fact that the amendment was issued during the first month of fall, and that a model year was then viewed as starting for the industry as a whole at some undefined point during the fall (*Center for Auto Safety v. NHTSA*, 710 F.2d 842 (D.C. Cir. 1983)). In that case, the court applied the APA definition of "rule" in determining that the withdrawal of an advance notice of proposed rulemaking regarding CAFE standards constituted a rule as that term is used in the Title V provision subjecting rules to judicial review in accordance with the APA. In *In Re Center for Auto Safety*, 793 F.2d 1346, 1349 (D.C. Cir. 1986), the Court of Appeals for the D.C. Circuit subsequently found that the industry model year is traditionally thought to begin on October 1. Even if October 1 is to be regarded as the beginning of the industry model year, the interval between that date and October 16 is de minimis. The resultant adverse effect on the statutory scheme of issuing a standard at the end of that interval is likewise de minimis.

General Motors suggested that *In Re Center for Auto Safety* can be viewed as upholding the 1985 and 1986 standards for light trucks notwithstanding the Court's viewing both actions as untimely. NHTSA believes that the expiration of a statutory deadline does not, in and of itself, deprive an agency of the ability to carry out a mandatory duty to establish light truck CAFE standards. However, NHTSA does not believe that *In Re Center for Auto Safety* stands for the proposition that the agency may freely exercise its discretionary rulemaking authority after the expiration of a deadline for exercising it. That question was not directly at issue in that case. Further, the Court's disapproval of post-deadline rulemaking actions is clear. The Court noted that the amendment to the MY 1985 light truck standards was issued after the beginning of the model year (793 F.2d at 1349) and characterized the agency's missing of the 18-month statutory deadline as both illegal and unreasonable. The Court stated further that:

As the model year approaches, the agency loses the capacity to do anything more than rubberstamp the fuel economy levels projected by the manufacturers unless it wishes to risk economic dislocation. When the agency's role descends to this level, not only is NHTSA's credibility impaired, but EPA's system of mandatory standards becomes meaningless. (*Ibid.* at 1354.)

This disapproving view of the agency's missing a statutory deadline for the mandatory establishment of light truck

CAFE standards does not supply any support for the notion that the agency could freely ignore a deadline for the discretionary act of amending standards, particularly in the case of an amendment that would (as in the case of the amendments sought here by petitioners) be issued not during the first month of the model year in question (as in the case of the amendment of the 1985 model year standard), but years later.

As to the granting of exemptions and setting of alternative standards for low volume manufacturers, the agency believes the difference between providing a low volume manufacturer with an exemption from the generally applicable standards and amending those standards as they apply to the nonexempt manufacturers is significant. Low volume manufacturer exemptions are contemplated by the statute. Granting even retroactive exemptions does not disturb the statutory scheme of Title V. The low volume manufacturers account for only a small fraction of one percent of the total annual production of passenger automobiles and each exemption is applicable only to one specific manufacturer. Granting the low volume exemptions leaves undisturbed the statutory scheme for establishing and enforcing industry-wide CAFE standards for the manufacturers representing the remaining 99 plus percent of total annual production. The conference report language cited above regarding the timing of amendments that reduce standards applies only to amendments reducing the generally applicable standards.

II. Even if the Agency Concluded That Retroactive Amendment Were Consistent With the Statutory Scheme, It Would Have to Establish the "New" Standard at the Maximum Feasible Level

Both petitioners have suggested that the appropriate CAFE standard for 1985 is 26.0 mpg "or lower," notwithstanding the fact that neither General Motors nor Mercedes reached the 26.0 level that year. Mercedes makes the same suggestion for the 1984 standard. In fact, General Motors' CAFE for 1985 was 25.8, while Mercedes' CAFE that year was 23.6 mpg. It is not clear why the petitioners suggested a range of levels, some of which are above the CAFE levels they actually achieved. While reducing the standards, but not as far as the levels actually achieved, would certainly make it easier for petitioners and others to offset the remaining (smaller) shortfall with available credits, this agency has consistently declined to consider the availability of credits (or

conversely, the need for credits) in its annual standard setting. See *Center for Auto Safety v. Claybrook*, 627 F.2d 346, at 348 (D.C.Cir. 1980) on the related issue of considering the ability to pay civil penalties. Thus, the agency could not establish a standard of 26.0 mpg merely because petitioners have enough credits to offset the remaining shortfall.

The agency notes that the petitioners might have suggested an amended standard of 26.0 mpg, as opposed to some lower standard, because of uncertainty over whether the agency retains its authority to set passenger automobile standards below 26.0 in the wake of the Supreme Court's decision in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), regarding legislative vetoes. Section 502(a)(4) provided that amendments setting a standard for 1985 or any year thereafter outside the 26.0 to 27.5 mpg range were subject to a legislative veto. However, such legislative vetoes were declared unconstitutional in *Chadha*. There is a difference of opinion whether the legislative veto provision in section 502(a)(4) is fully severable from the language in the balance of that section authorizing amendment of the standard for 1985 or any year thereafter to whatever level is found by the agency to be the maximum feasible level. Some commenters in past fuel economy rulemakings have suggested that the veto is not fully severable. However, as Mercedes noted in its petition, the Department of Justice has previously advised this agency that it had reached the opposite conclusion.

In suggesting 26.0 mpg, the same as the level of the amended standards for model years 1986-88, petitioners have not suggested a new analytical approach to the determination of "maximum feasible," nor is there any reason to believe that 26.0 mpg would be the industry-wide "maximum feasible" level for 1984 or 1985. In establishing a new standard for model year 1984 or 1985, the agency would not be able simply to use the result (i.e., the establishment of amended standards of 26.0 mpg) or even the methodology of the rulemaking proceedings it conducted in 1985 and 1986 to reduce the model year 1986-88 standards. Those results and the methodology were peculiarly suited to the particular circumstances of those model years and to the timing of the amendments in relation to those model years.

The agency disagrees with Mercedes' suggestion that the level of CAFE actually achieved by the manufacturers in model year 1984-85 provides, by itself, an appropriate or reliable guide to

determining the maximum feasible level of CAFE for those years. The agency could not simply adopt the level of actual achievement as the maximum feasible level. For the agency to take that approach would be to "rubberstamp" the decisions of the manufacturers instead of making an independent determination about the manufacturers' capabilities. The issue that must be resolved by the agency is not only what the manufacturers in fact achieved, but also whether they could have accomplished more.

To the extent that the various manufacturers achieved significantly different levels of CAFE in a given year, the issue whether the level achieved by the manufacturers with lower CAFE represents the maximum they could have achieved becomes even more important. The agency observes that while both petitioners fell below even the 26.0 level for model year 1985, Ford achieved 26.6 mpg that year.

Even if actual industry achievement were an appropriate departure point for an analysis of the proper level, it does not appear that a level of 26.0 mpg would sustain analytic review. General Motors suggested that the agency should apply its own methodology explained in the decisions to reduce the standards for model years 1986-1988. That methodology consisted of:

first evaluating the maximum feasible average fuel economy level that manufacturers are now capable of achieving * * *, taking into account the four factors of section 502(e) and second, to the extent that level is determined to be below 27.5 mpg, assessing the sufficiency of manufacturers' efforts to meet the 27.5 standard, in light of the information available to manufacturers at the time fuel economy product decisions were being made and the four factors of section 502(e). (October 4, 1985; 50 FR 40528, 40533)

The "reasonable efforts" test regarding the sufficiency of the manufacturers' compliance efforts to date was adopted by the agency in its belief that it would be an abuse of discretion to reduce a CAFE standard if a current inability to meet such standard simply resulted from the regulated industry's previously declining to take sufficient steps to meet the standard. Reducing a standard based on an inability of that origin would be inconsistent with Title V's mandate for a program of *maximum feasible* CAFE standards.

General Motors' petition states that application of this methodology dictates that the model year 1985 standard should be amended to 26.0 mpg or lower. However, the petitioner may have misapprehended the agency's reliance on the "reasonable efforts" test. In other

proceedings, the agency's analysis of "reasonable efforts" was a factor in deciding *whether to amend at all*, but was not used by the agency in selecting a particular level at which to set an amended standard. Instead, the agency determined the new "maximum feasible" fuel economy level, as specified in section 502(e), by assessing the manufacturers' capabilities for fuel economy improvement in the remaining time available to the manufacturers.

Obviously, the concept of "improvements in the time remaining" is not relevant in the context of retroactive rulemaking, since there is no "time remaining" in which to make improvements. However, it is not clear what analytical approach would take its place, nor have petitioners suggested any. For example, the agency's consideration of the "economic practicability" criterion has focused on the costs of complying with the standard in a particular year, without regard to available credits. This analysis does not work with a retroactive assessment of "maximum feasible," since the petitioners did not comply, and since it is now impossible to incur any costs (or restrict any products) in order to comply in a model year that has already ended. The agency acknowledges that there could be costs associated with generating credits in later years in order to offset the 1985 shortfall, but, consistent with its longstanding practice, it has not considered the need for, or availability of, credits in assessing the "economic practicability" of a particular standard for model year 1985.

The agency is not, however, declining to amend merely because it would have to determine the "maximum feasible" level for model year 1985 independent of the determination already made for model year 1986 or because it would be hard to make the determination for model year 1985. The agency cites the analytical difficulties only as support for its argument that the statutory framers did not contemplate retroactive rulemaking when they drafted the law. NHTSA notes, however, that any retroactive standard setting that purported to have analytic support (instead of standard setting based on merely accepting actual achievement by the industry as the definition of "maximum feasible.") would necessarily involve the agency in the sort of "second-guessing" after-the-fact that it tried to avoid in the model year 1986-1988 proceedings. As NHTSA noted in those proceedings, it is easy to reflect from today's vantage point on choices that the manufacturers could have made

in the early 1980's in order to meet the standard by 1984 and 1985. The agency declined to judge manufacturers' choices about product actions with 20-20 hindsight, however, deeming that "inappropriate" (50 FR 40528, 40533; October 4, 1985). NHTSA could not avoid that kind of "inappropriate" second-guessing if it were to grant these petitions, since it would have to determine independently what the correct "maximum feasible" level was.

III. The Agency's Reaffirms Its View of the Meaning of "Maximum Feasible Fuel Economy Level"

Mercedes argued in its petition that NHTSA's interpretation of the statutory concept of "maximum feasible" is invalid under Title V, because it concentrates on those manufacturers with substantial market share and excludes significant segments of the market, i.e., European manufacturers and limited line manufacturers, from consideration. As a result, Mercedes said, these manufacturers are forced to choose between taking drastic product actions in an attempt to comply or paying civil penalties. The petitioner stated that the agency:

Should take into account the collective ability of manufacturers within each significant market segment, including European manufacturers, as a class, and limited line manufacturers, as a class.

Mercedes argued further that the agency's interpretation discriminates against European and limited line manufacturers and violates the provision in the Trade Agreement Act of 1979 regarding the application of standards in such a way as to create unnecessary obstacles to foreign trade. Finally, the petitioner said that the agency should consider the relationship between safety and vehicle size and weight in determining the maximum feasible level of CAFE for model years 1984-85.

The statute requires that, for each model year, there be a single standard for all passenger automobile manufacturers not exempted under section 502(c). Unlike section 502(b) regarding light trucks, section 502(a) does not authorize the separation of the passenger automobile fleet into different classes or the setting of different standards for those classes.

Section 502 does not expressly state whether the concept of feasibility is to be determined in setting passenger automobile standards on a manufacturer-by-manufacturer basis or on an industrywide basis. The agency has therefore consulted the legislative history of Title V for indications of

congressional intent that would aid in resolving this question. The conference report accompanying Title V states, with respect to determining the maximum feasible average fuel economy level:

Such determination should therefore take industrywide considerations into account. For example, a determination of maximum feasible average fuel economy should not be keyed to the single manufacturer which might have the most difficulty achieving a given level of average fuel economy. Rather, the [Administrator] must weigh the benefits to the nation of a higher average fuel economy standard against the difficulties of individual automobile manufacturers. Such difficulties, however, should be given appropriate weight in setting the standard in light of the small number of domestic automobile manufacturers that currently exist and the possible implications for the national economy and for reduced competition associated with a severe strain on any manufacturer. However, it should also be noted that provision has been made for granting relief from penalties under section 508(b) in situations where competition will suffer significantly if penalties are imposed. (S. Rep. No. 94-516, 94th Cong., 1st Sess. (1975) p. 154-55)

NHTSA has construed this language many times. For example, as NHTSA stated in the 1977 notice establishing the model year 1981-84 standards for passenger automobiles, Congress did not intend that standards simply be set at the level of the single least capable manufacturer. Setting standards in that fashion would have made achievement of Congress' goals for substantial fuel economy improvement extremely difficult, if not impossible from the start. For example, the entire statutory scheme could have been frustrated by setting the standards at the level of a small (e.g., market share of several tenths of one percent) manufacturer whose capability was 19 mpg. Such standards would have negated the ability of the statute to secure any significant improvements in industry-wide fuel economy. On the other hand, the conference report suggests that the agency must give some consideration to the potential effects on the national economy that would be associated with the particular difficulties of individual manufacturers, especially the domestic manufacturers.

In construing the conference report's discussion of balancing in the rulemaking to establish the model year 1981-84 standards, the agency noted that the average fuel economy levels of most foreign manufacturers were higher than those of the domestic manufacturers at the time of the rulemaking. According to the data used in establishing these standards, most foreign manufacturers needed only to

maintain or marginally improve their average fuel economy in order to comply with those standards. Most of the methods available to domestic manufacturers for improving fuel economy were also available to the foreign manufacturers. The agency projected that the standards were clearly feasible in all years for three of the four domestic manufacturers (the exception being American Motors), for seven of ten European manufacturers (the exceptions being Mercedes, BMW, and Volvo) and for 12 of the 15 foreign manufacturers.

NHTSA noted that, in making its projections for 1981-84, Mercedes relied primarily on the single method of increasing the percentage of diesel-powered cars in its fleet. Mercedes placed little reliance on other methods. For example, Mercedes' projections were based on relatively little weight reduction. (See 42 FR 33534; at 33549)

In interpreting the conference report language since then, the agency has adopted the position that the standards should not be set above the capability of the least capable manufacturer with a substantial share of the market. (50 FR 29912, at 29923) In the final rule reducing the model year 1986 standard, and again in the final rule reducing the model year 1987-88 standards, the agency concluded that the particular compliance difficulties of several of the European manufacturers did not justify a standard set far below the capabilities of the other manufacturers.

NHTSA continues to believe that its interpretation is correct. In the mid-1980's, as in the late 1970's when the model year 1981-84 standards were established, those several European manufacturers produced only about two to three percent of the passenger cars sold in the U.S.

At the same time Mercedes suggested that the agency follow its current interpretation of "maximum feasible" and set the model year 1984-85 standards in accordance with the capability of the least capable of the manufacturers with a substantial market share. Mercedes suggested also that following the agency's interpretation would discriminate against European and limited line manufacturers. Those manufacturers are generally smaller and often less capable than the "least capable of the manufacturers with a substantial market share." The agency does not believe that the petitioner's suggestion of discrimination has merit. If the model year 1984-85 standards were changed in the fashion suggested by Mercedes, they would be below the CAFE of most European and limited line

manufacturers. If the model year 1984 standard were set at the 24.9 mpg level achieved by General Motors for that year, the standard would be above Jaguar's level, but *below* that achieved by Peugeot, Saab, Mercedes, Alfa-Romeo, and Volkswagen. If the model year 1985 standard were set at the 25.8 level achieved by General Motors for that year, the standard would be above the levels of Jaguar, Mercedes, and Peugeot, but *below* those of Porsche, BMW, Saab, Volvo, Alfa-Romeo and Volkswagen.

As to Mercedes' suggestion about considering the relationship of safety to vehicle size and weight in reducing the model year 1984-85 standards, the agency notes that size and weight of the model year 1984-85 passenger automobiles would not be affected by any change now in those standards,

because those vehicles were built and sold long ago. Consequently, even if the agency agreed that the safety of those vehicles would be theoretically affected by the CAFE level, safety could not now be enhanced by retroactively reducing those standards. For a further discussion of NHTSA's views regarding the relationship of safety and CAFE standards, see the final rule reducing the model year 1987-88 standards for passenger automobiles (October 6, 1984; 51 FR 35594, at 35612-35613).

NHTSA also notes that Mercedes' arguments regarding the interpretation of "maximum feasible" are directed at methodology and conclusions reached in the agency's rulemakings to reduce the model year 1986-88 standards, and thus, are outside the scope of Mercedes' petition to reduce the model year 1984-85 standards. Although the reduction of

the model year 1986-88 standards has been challenged in court, Mercedes did not join that challenge. When the model year 1984 standard was set, the agency acknowledged that the standard was higher than the projected capability of Mercedes (among others). (See the final rule establishing the model year 1981-1984 CAFE standards, June 30, 1977; 42 FR 33534, 33549). Mercedes similarly did not seek judicial review of that rule. Of course, the model year 1985 standard was set by statute, and did not take account of any particular manufacturer's projected capability for that year.

(15 U.S.C. 20002; delegation of authority at 49 CFR 1.50)

Date: April 25, 1988.

Diane K. Steed,

Administrator.

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